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Nos. 00-1531 & 00-1711

IN THE

Supreme Court of the United States

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER VERIZON MARYLAND INC.

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QUESTION PRESENTED

Whether a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's action interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996.

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties in the court of appeals were as follows:

American Communications Services of Marypland, Inc.

Bell Atlantic-Maryland, Inc. (now Verizon Maryland Inc.)

Susanne Brogan, in her official capacity as Commissioner of the Public Service Commission of Maryland

E. Mason Hendrickson, in his official capacity as Commissioner of the Public Service Commission of Maryland

Glenn F. Ivey, in his official capacity as Chairman of the Public Service Commission of Maryland

Claude M. Ligon, in his official capacity as Commissioner of the Public Service Commission of Maryland

MCI WorldCom, Inc.

MCImetro Access Transmission Services, Inc.

Maryland Office of People's Counsel

Public Service Commission of Maryland

RCN Telecom Services of Maryland, Inc.

Catherine I. Riley, in her official capacity as Commissioner of the Public Service Commission of Maryland

Starpower Communications, LLC

TCG-Maryland

United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Verizon Maryland Inc. states the following:

Verizon Maryland Inc. (formerly Bell Atlantic-Maryland, Inc.) is a wholly owned subsidiary of Verizon Communications Inc., a publicly held company. No publicly held company owns 10% or more of the stock of Verizon Communications Inc.

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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER VERIZON MARYLAND INC.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a)[1] is reported at 240 F.3d 279. The opinion of the district court (Pet. App. 73a-90a) is not reported. The order of the Maryland Public Service Commission (Pet. App. 91a-111a) is not reported.

[1] "Pet. App." refers to the appendix to the petition filed by Verizon Maryland Inc. in No. 00-1531.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2001. The petition for a writ of certiorari in No. 00-1531 was filed on April 5, 2001, and the petition for a writ of certiorari in No. 00-1711 was filed on May 15, 2001. On June 25, 2001, both petitions were granted, limited to Question 2 presented by each petition. 121 S. Ct. 2548. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, the relevant provisions of the Telecommunications Act of 1996 and the Federal Communications Commission's implementing regulations, and 28 U.S.C. § 1331 are set forth at Pet. App. 112a-134a.

STATEMENT OF THE CASE

As required by the Telecommunications Act of 1996 ("1996 Act"), petitioner Verizon Maryland Inc. ("Verizon") entered into an "interconnection agreement" with respondent MFS Intelenet of Maryland, Inc. ("MFS"), a competitive local exchange carrier ("CLEC"). The interconnection agreement provided that "reciprocal compensation" — the amount that one interconnecting carrier pays another for traffic that originates on one network and terminates on the other — would be due only to the extent required by the 1996 Act. The Federal Communications Commission ("FCC") ruled that the 1996 Act does not require reciprocal compensation for Internet-bound traffic. The Maryland Public Service Commission ("PSC") nevertheless interpreted the interconnection agreement to require Verizon to pay MFS reciprocal compensation for Internet-bound traffic, a ruling that forced Verizon to transfer to MFS and other competitors many millions of dollars that it had never agreed to pay and that federal law did not require it to pay. Verizon challenged the PSC's decision in federal district court, basing jurisdiction, in part, on 28 U.S.C. § 1331.

The question presented by this case is whether a federal court may exercise § 1331 "arising under" jurisdiction in an action alleging that a state commission has interpreted or enforced a 1996 Act interconnection agreement in violation of federal law.

1. Interconnection Agreements and the 1996 Act. The 1996 Act "fundamentally restructures local telephone markets" by subjecting incumbent local telephone companies to "a host of duties intended to facilitate market entry." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The documents detailing incumbents' duties, though referred to as "interconnection agreements," are not voluntary contracts in any ordinary sense. An incumbent local exchange carrier ("LEC") has no choice about whether to enter into such an "agreement" when a CLEC makes a request. On the contrary, the 1996 Act requires incumbents, upon a CLEC's request, "to negotiate in good faith . . . the particular terms and conditions of agreements to fulfill" the 1996 Act's substantive duties. 47 U.S.C. § 251(c)(1); *see also id.* § 252(a)(1).

Although carriers are permitted to "negotiate and enter into a binding agreement . . . without regard to the standards set forth" in the 1996 Act (*id.* § 252(a)(1)), "many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act" (*AT&T Communications of Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000)). That is so because the Act, as interpreted by the FCC, effectively discourages attempts to negotiate terms that provide either less or more than the Act requires.

First, parties negotiate against the backdrop of statutory and regulatory requirements that dictate the

minimum terms to which an incumbent carrier will be held in the absence of a negotiated agreement. Section 252(b) provides that either party to a negotiation may "petition the state commission . . . to arbitrate open issues, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder." *AT&T*, 525 U.S. at 373; *see* 47 U.S.C. § 252(b), (c). Accordingly, so long as an issue has already been "resolved by . . . FCC Rules and interpretations," a CLEC has little motivation to accept anything less than the federal requirement. *AT&T Communications*, 229 F.3d at 465.

Second, an incumbent is discouraged from agreeing to anything that exceeds its obligations under federal law because "any interconnection, service, or network element provided under an agreement approved under" § 252 must be made available to "any other requesting telecommunications carrier upon the same terms and conditions." 47 U.S.C. § 252(i). As a consequence, an incumbent cannot safely engage in ordinary "give-and-take" because, as the FCC has interpreted § 252(i), "every concession . . . made (in exchange for some other benefit) by an incumbent LEC will automatically become available to every potential entrant." *AT&T*, 525 U.S. at 395. Together, therefore, §§ 252(b) and 252(i) impel the parties to match the terms of their interconnection agreement to the commands of federal law.

Whether an agreement is arrived at by negotiation or arbitration, the parties must submit the agreement to the appropriate state public utility commission for approval and public filing. *See* 47 U.S.C. § 252(a)(1), (e)(1). Once an agreement has been approved, federal law requires the parties to abide by its terms. Section 252(a)(1) explicitly provides that interconnection agreements are "binding." *Id.* § 252(a)(1). Likewise, several provisions in § 251 refer to the obligation of incumbent carriers to provide network access and interconnection "in accordance with the terms and

conditions of the agreement." *See id.* § 251(c)(2)(D), (c)(3). In short, the obligations imposed by an interconnection agreement are not private contractual obligations, but federal regulatory obligations that apply equally to all similarly situated telecommunications carriers.

2. Reciprocal Compensation and the Internet. Section 251(b)(5) requires LECs to enter into "reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.* § 251(b)(5). Under "reciprocal compensation," when a customer of Carrier A places a call to a customer of Carrier B in the same local calling area, Carrier A pays Carrier B for terminating that local call. Likewise, when a customer of Carrier B calls a customer of Carrier A, Carrier B pays Carrier A for terminating the call.

The FCC has consistently held that § 251(b)(5)'s reciprocal-compensation obligation applies only to intra-exchange telecommunications traffic (that is, calls that originate and terminate within the same local calling area). For non-local or "interexchange" calls, a different set of rules applies (those governing long-distance "access charges").[2]

The application of this rule to traditional local voice telephone calls has been relatively straightforward, but the question whether reciprocal compensation applies to Internet-bound calls has given rise to disputes. A customer typically initiates an Internet session by

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[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013, ¶ 1034 (1996) (subsequent history omitted); *see also* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, 2001 WL 431687, ¶¶ 36-37 (rel. Apr. 27, 2001) ("*ISP Remand Order*") (confirming that § 251(b)(5) does not apply to "access services or services associated with access"), *petitions for review pending*, Nos. 01-1218 *et al.* (D.C. Cir.).

using a modem to connect to the facilities of an Internet service provider, or "ISP," such as America Online. The ISP then completes the communication link by connecting the customer to the requested website, which may be located anywhere in the world.

CLECs have typically argued that, because many ISP access numbers are "local" — that is, associated with the subscriber's local calling area — Internet-bound calls are subject to reciprocal compensation under § 251(b)(5). Incumbents, by contrast, have typically maintained that Internet-bound calls are interstate and interexchange in nature, because such calls do not terminate at the ISP's modem but continue in an unbroken transmission to distant websites. Before the FCC definitively resolved this issue, a number of state commissions had ruled that Internet-bound calls are actually two calls — a local call to the ISP and a subsequent communication between the ISP and the distant website — and that the initial call to the ISP is local in nature and therefore subject to reciprocal compensation.

The FCC has made clear that those rulings were incorrect. It has repeatedly ruled that an Internet-bound call is a single end-to-end communication between the customer and the distant website, a call that is therefore interstate and interexchange. *See ISP Remand Order* ¶¶ 58-60. The agency has specifically ruled that, because Internet-bound traffic is interstate access traffic, it is "not subject to the reciprocal compensation requirement in section 251(b)[(5)]." *Id.* ¶ 23; *accord id.* ¶ 30.

The FCC also explained in detail that the decisions of various state commissions requiring payment of reciprocal compensation for Internet-bound traffic have directly undermined the goals of the 1996 Act. Such rulings have "led to classic regulatory arbitrage," were

a "windfall" for CLECs, and "distort[ed] the development of competitive markets." *Id.* ¶¶ 21, 29, 70. Such payments give CLECs "every incentive to compete, not on [the] basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers." *Id.* ¶ 4. The FCC expressed its approval of state commission decisions denying CLECs compensation for Internet-bound calls (*id.* ¶¶ 80, 82); it also preempted contrary decisions on a going-forward basis and imposed a federal compensation mechanism, intended gradually to eliminate such payments. At the same time, the *ISP Remand Order* did not purport to affect prior state commission decisions that had ordered reciprocal compensation, leaving that matter to the ordinary process of judicial review.

3. **The Dispute Below.** In May 1997 — well before the FCC had addressed the issue of reciprocal compensation for Internet-bound traffic — MFS filed a complaint with the Maryland PSC alleging that Verizon's refusal to pay reciprocal compensation on Internet-bound traffic violated the 1996 Act and the parties' interconnection agreement. The PSC ruled that Internet-bound calls are local and therefore subject to reciprocal compensation. Pet. App. 94a-96a. The PSC promised to revisit its determination, however, in the event that subsequent FCC rulings had a bearing on the subject. *Id.* at 106a-107a.

In February 1999, the FCC expressly ruled that Internet-bound calls are non-local calls that do not qualify for reciprocal compensation under § 251(b)(5). *See* Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689 (1999).[3] Immediately

[3] This ruling was vacated by the D.C. Circuit in *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). The *ISP Remand Order* reaffirmed the FCC's prior conclusion.

thereafter, Verizon asked the PSC to revise its own prior determination in light of the FCC's controlling interpretation of federal law. The operative language of the governing interconnection agreement left no doubt that the parties' obligations tracked those imposed under federal law. The agreement provides:

> "Reciprocal Compensation" is As Described in the [1996] Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Local Traffic . . . .

See C.A. App. 55; Pet. App. 101a. The agreement also defines "Local Traffic" in a manner that tracks the then-existing FCC regulation almost word for word. *See* C.A. App. 53; Pet. App. 101a.[4]

Nonetheless, a sharply divided PSC refused, by a 3-2 vote, to alter its earlier determination. Instead, it ruled that, because "the treatment of [Internet-bound] traffic as local was so prevalent in the industry," Verizon "had an obligation to negate such local treatment in the interconnection agreements it entered into by specifically excluding [Internet-bound] traffic from the definition of local traffic subject to the payment of reciprocal compensation." Pet. App. 103a. The majority also expressed concern that the FCC's holding (that Internet-bound traffic is not subject to reciprocal compensation) "will result in CLECs receiving no compensation for terminating [Internet]-bound traffic"; it therefore adopted an interim compensation mechanism for Internet-bound traffic in direct conflict with the federal rule. *Id.* at 106a-107a.[5]

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[4] After the PSC approved the Verizon-MFS agreement, a number of other CLECs adopted the relevant provisions of the agreement pursuant to § 252(i) and the FCC's implementing regulations.

[5] The district court held that this aspect of the PSC's decision was not ripe for review. Pet. App. 89a. Neither party appealed that holding.

4. The Proceedings Below. Verizon sought review of the PSC's decision in the United States District Court for the District of Maryland, citing as the basis for jurisdiction 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. The complaint named as defendants the Maryland PSC, the members of the Maryland PSC in their official capacity, MFS, and the five other affected carriers.

On the PSC's motion, the district court dismissed the complaint on the ground that the Eleventh Amendment precluded its exercise of subject matter jurisdiction under either § 252(e)(6) or § 1331. Pet. App. 73a-90a.

A divided panel of the Fourth Circuit affirmed. *Id.* at 1a-72a. The majority began by rejecting Verizon's Eleventh Amendment arguments, holding both that the PSC did not waive its immunity from suit in federal court by voluntarily participating in the 1996 Act's regulatory scheme (*id.* at 14a-21a), and that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not permit this action to proceed against the individual members of the PSC in their official capacity to restrain ongoing violations of federal law (Pet. App. 21a-30a). Having ruled that neither the PSC nor its members could lawfully be made parties to the federal court action, the court held next that the district court lacked jurisdiction under § 252(e)(6) to allow the action to proceed against the private defendants. *Id.* at 30a-47a.

Finally, on the specific question presented here, the majority held that "28 U.S.C. § 1331 does not provide federal jurisdiction over [Verizon's] claims" because, in its judgment, "Congress intended that federal jurisdiction be limited to the grant in 47 U.S.C. § 252(e)(6)." *Id.* at 50a. The court predicated its holding, in part, on

its view that the *Rooker-Feldman* doctrine[6] — under which "lower federal courts are not authorized to review final judgments from State court proceedings" (*id.* at 50a n.8) — should be extended to prohibit, "in the absence of specific federal authorization," federal court review of orders issued by "a State quasi-judicial body, such as the Maryland Public Service Commission." *Id.* at 50a. The court acknowledged that its ruling on § 1331 conflicted with the Sixth Circuit's decision in *GTE North, Inc. v. Strand*, 209 F.3d 909, 919 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000). *See* Pet. App. 50a.

Judge King dissented. Concerned that the majority had "isolate[d] itself . . . from every other court of appeals that has decided these issues" (*id.* at 52a), and "find[ing] these [other] decisions highly persuasive in addressing the jurisdictional and immunity issues" (*id.* at 53a-54a), Judge King concluded (i) that "§ 252(e)(6) expressly confers jurisdiction on the federal courts to review the states' enforcement determinations" (*id.* at 56a); (ii) that "a state waives the defense of sovereign immunity by electing to participate in the regulation of interconnection agreements" (*id.* at 59a); and (iii) that, "[e]ven if Maryland had not waived its Eleventh Amendment immunity, the individual members of the Commission still may be sued in their individual capacities, pursuant to *Ex parte Young*, for prospective injunctive relief" (*id.* at 67a). Because Judge King believed that "jurisdiction is provided in the district courts by § 252(e)(6)," he found it "unnecessary . . . to reach the argument that 28 U.S.C. § 1331 confers general federal question jurisdiction." *Id.* at 58a n.5. He added, however, that, "contrary to the assertion of

[6] The *Rooker-Feldman* doctrine refers to *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

the majority, the *Rooker-Feldman* doctrine has no application here." *Id.* (citation omitted).

5. The Grant of Certiorari. Both Verizon and the United States filed petitions for writs of certiorari raising all four issues (jurisdiction under § 252(e)(6), jurisdiction under § 1331, Eleventh Amendment waiver, and *Ex parte Young*). This Court granted both petitions, limiting its grant to Question 2 presented by each petition — whether, if 47 U.S.C. § 252(e)(6) does not apply, a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act. The Court consolidated the cases and set them for oral argument in tandem with No. 00-878, *Mathias v. WorldCom Technologies, Inc.*, which presents the remaining three questions raised by the petitions for writs of certiorari in this case.

SUMMARY OF ARGUMENT

Section 1331 grants federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." A civil action "arises under" federal law for purposes of § 1331 when "a right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936); *accord City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997). Verizon's claim below — that the PSC's determination violated the federal Telecommunications Act of 1996 — plainly satisfies that test. Moreover, neither the 1996 Act nor this Court's *Rooker-Feldman* doctrine divests a federal district court of jurisdiction over a case like this one.

I. An action seeking review of a state commission's interpretation of a 1996 Act interconnection agreement arises under federal law.

A. In the 1996 Act, Congress granted incumbent carriers the statutory right to "negotiate and enter into *a binding agreement* with the requesting telecommunications carrier or carriers," and to do so "without regard to the standards set forth in [§ 251(b) and (c)]." 47 U.S.C. § 252(a)(1) (emphasis added). Federal law thus gives Verizon the right to insist that it be held only to the terms of the interconnection agreement to which it actually agreed. The statutory right granted under § 252(a) is accordingly "an element, and an essential one," of Verizon's claim.

B. Any claim relating to the rights and obligations imposed under a 1996 Act interconnection agreement raises questions of federal law. Contrary to the court of appeals' apparent understanding, interconnection agreements are not ordinary state-law contracts, but rather "federal contract[s]," the interpretation or enforcement of which, under this Court's precedents, raises questions of federal law subject to federal court jurisdiction under § 1331. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963). Like the Railway Labor Act contracts at issue in *Central Airlines*, interconnection agreements "are creations of federal law and bound to the statute and its policy"; they are "therefore governed and enforceable by federal law, in the federal courts." *Id.*

That conclusion is fortified by a separate line of this Court's decisions. Because federal law mandates the creation of interconnection agreements, stipulates that they include a detailed schedule of charges, directs that they be published, requires a carrier to provide service according to their terms, and specifies that service must be made available on the same terms to all parties, these 1996 Act agreements are functionally

indistinguishable from federal tariffs. Insofar as interconnection agreements possess the core characteristics of tariffs, this Court's precedents strongly suggest that a claim involving enforcement of such an agreement, like a claim involving enforcement of a federal tariff, necessarily arises under federal law and presents questions reviewable in federal court. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534 (1983) (per curiam); *Louisville & N.R.R. v. Rice*, 247 U.S. 201, 202 (1918).

II. No other law barred the district court from exercising the jurisdiction granted to it under § 1331.

A. Nothing in the 1996 Act suggests that Congress intended to restrict the jurisdiction of the federal courts in cases like this one. The 1996 Act specifically confers jurisdiction on federal courts under § 252(e)(6) and withdraws jurisdiction from state courts under § 252(e)(4). To the extent those sections do not reach this case, the statute is silent on the proper method for review. This Court has held that "the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Stark v. Wickard*, 321 U.S. 288, 309 (1944). This is true even if the statute in question specifically provides for judicial review in other circumstances. *Id.*; *see also Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56 (1993); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 494 (1991).

B. The *Rooker-Feldman* doctrine does not divest the federal court of its federal-question jurisdiction in a case like this one. That doctrine "interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622 (1989). The doctrine has no application to judicial review of

determinations by a state administrative agency. As this Court held in *City of Chicago*, "federal jurisdiction generally encompasses judicial review of state administrative decisions." 522 U.S. at 169.

That holding applies with full force here. First, the PSC was exercising authority granted to it under *federal* law, not merely under state law. Just as federal courts have jurisdiction to review action by federal agencies, they likewise have jurisdiction to review action by state agencies exercising federal statutory authority. Second, unlike the situation in *City of Chicago*, *all* of Verizon's claims arise under federal law. Thus, there is no issue here concerning litigation of state-law issues in federal court. For the same reason, the concerns that animate abstention doctrine have no application to this case.

ARGUMENT

At issue in this case is whether a federal district court has jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission has interpreted a 1996 Act interconnection agreement in a manner consistent with federal law. This Court has already suggested the answer to that question, having observed that "there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *AT&T*, 525 U.S. at 378 n.6.

That principle applies here: it is a core function of the federal courts to ensure that federal administrative authority is exercised in accordance with governing federal law. "From the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting

Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967)) (alteration in original). Such review is fundamental to the constitutional legitimacy of the delegation of power by Congress. "The responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Stark*, 321 U.S. at 310. "[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Id.*

It is of no consequence that the PSC is a state rather than a federal agency. *See City of Chicago*, 522 U.S. at 169. In resolving the dispute between the private parties before it concerning the scope of Verizon's duties under the interconnection agreements at issue, the PSC was exercising federal authority under a federal statute that sets forth Congress's scheme for regulation of local telecommunications markets. For that reason, if the PSC had declined to exercise that authority, as it was free to do, the FCC would have had to step in and "assume the responsibility of the State commission . . . with respect to the proceeding or matter." 47 U.S.C. § 252(e)(5).[7] In the PSC's view,

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[7] The FCC did precisely that when the Virginia State Corporation Commission declined to act in a case involving issues similar to those that the PSC addressed in the decision at issue here. The FCC ruled that the Virginia commission's refusal to "interpret and enforce . . . interconnection agreements" constituted a "'fail[ure] to act to carry out its responsibility' *under section 252*," and it accordingly preempted the Virginia commission's jurisdiction and assumed its responsibility to decide the matter. Memorandum Opinion and Order, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277, 11280, ¶ 7 (2000) (quoting 47 U.S.C. § 252(e)(5)) (emphasis added).

Congress's scheme required the transfer of millions of dollars from Verizon to the private defendants below. Verizon's claim is that federal law does not authorize the exaction the PSC imposed. Under settled law, such a claim invokes the jurisdiction of the federal courts.

I. VERIZON'S CLAIM ARISES UNDER FEDERAL LAW

"For purposes of determining whether jurisdiction exists under § 1331(a) . . . , it is not necessary to decide whether [Verizon's] alleged cause of action . . . is in fact a cause of action 'on which [Verizon] could actually recover.'" *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70 (1978) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). Rather, the test is whether the claimed right is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974). When a plaintiff claims that "'federally protected rights have been invaded,'" the "allegations are sufficient to sustain jurisdiction under § 1331(a)." *Duke Power*, 438 U.S. at 71 (quoting *Bell*, 327 U.S. at 684).

Verizon's claim rests on at least two sources of federal rights that the PSC's determination directly invaded. The first is the statutory right to enter into a "binding agreement" without regard to requirements that would otherwise be imposed under federal law. 47 U.S.C. § 252(a)(1). The second is the interconnection agreements themselves; the rights and obligations that arise thereunder are intrinsically federal in nature. Either source of rights establishes an independent and sufficient basis for federal court jurisdiction.

A. A Federal District Court Has Jurisdiction To Determine Whether the PSC's Interpretation Violates Verizon's Federally Protected Right To Enter into "Binding Agreement[s]"

Verizon's fundamental claim is that, in requiring Verizon to pay reciprocal compensation on Internet-bound traffic, the PSC acted contrary to the terms of the governing interconnection agreement, when read in light of controlling federal law. If that claim is correct — and it must be accepted as correct for purposes of determining the district court's jurisdiction — the PSC's determination violated § 252(a)(1), which provides that incumbent LECs may "negotiate and enter into a binding agreement . . . without regard to the standards set forth in [§ 251(b) and (c)]." 47 U.S.C. § 252(a)(1). Because federal law dictates that interconnection agreements, duly negotiated, approved, and filed in accordance with the requirements of § 252, are binding, a state commission is not permitted to impose obligations inconsistent with their terms.

The statutory right at issue is central to the congressional scheme. The obligations imposed on incumbent LECs under the 1996 Act represent an unprecedented intrusion on their right to control their own property. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 399-400 (7th Cir. 2000) (noting that the 1996 Act imposes "a host" of "affirmative duties to help one's competitors"). To reduce somewhat the intrusion that this regulation represents, Congress permits incumbents, in the first instance, to establish the terms of agreements free from direct regulatory interference. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 793 n.9 (8th Cir. 1997) ("an incumbent LEC is not bound by the Act's substantive standards in conducting voluntary negotiations"), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). That

relative freedom from the direct imposition of regulatory duties in circumstances where the parties have agreed to terms implementing the statute would be lost if a state commission were free to impose obligations notwithstanding the contrary terms of an interconnection agreement. It is, in part, the commission's lack of power to impose such obligations that gives meaning to § 252(a)(1).

For example, a state commission might regard an agreement to limit reciprocal compensation payments to those calls that are subject to reciprocal compensation under the 1996 Act as unwise for policy reasons. It might be "concerned" that such an agreement would "result in CLECs receiving no compensation for terminating [Internet]-bound traffic." Pet. App. 106a. It might believe that CLECs "incur costs to terminate" such traffic and that, absent reciprocal compensation, "CLECs will be forced to absorb these costs." *Id.* at 106a-107a. And it might, for this reason, labor to find a way around the plain language of an interconnection agreement, thereby rendering the parties' agreement non-binding and denying the incumbent its rights under § 252(a).

A state commission need not *deliberately* misconstrue an interconnection agreement to deny a party its rights under § 252(a). Whenever a state commission misinterprets an interconnection agreement the injury to the rights of the aggrieved party is the same. In judging whether a state commission's interpretation of an agreement is wrong, the district court's scope of review is a familiar one. *See, e.g., Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177, 185 (1938) (the question is "whether the [agency] in arriving at its determination departed from the applicable rules of law"). If the state commission's determination cannot withstand such review, it is inconsistent with § 252(a).

The circumstances of this case demonstrate the importance of that principle. The parties' agreement here provides that "Reciprocal Compensation" is "As Described in the Act," a defined term that means "as described in or required by the [1996] Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the [PSC]." Interconnection Agreement §§ 1.7, 1.61 (*see* C.A. App. 49, 55; Pet. App. 101a). The agreement further provides that reciprocal compensation is limited to "Local Traffic," defined as traffic that "is originated" and "terminates" within the same local calling area. *Id.* § 1.44 (*see* C.A. App. 53; Pet. App. 101a).

Verizon's claim is that the parties' agreement means what it says: reciprocal compensation is "as described in or required by the [1996] Act." And Verizon further claims that, as a matter of federal law, payment of compensation for Internet-bound traffic is *not* reciprocal compensation "as described in or required by the [1996] Act." The FCC has recently confirmed that understanding of federal law. *See ISP Remand Order* ¶ 23 (holding that the 1996 Act does not require payment of reciprocal compensation for Internet-bound traffic); *cf.* Interconnection Agreement § 1.7 (recognizing binding effect of "duly authorized rules and regulations of the FCC") (*see* C.A. App. 49).

The agreement's express incorporation of the federal statutory standard governing reciprocal compensation accentuates the federal interest in this case. As noted above, parties often adopt provisions that "fulfill the duties described in [§ 251(b) and (c)]" (47 U.S.C. § 251(c)(1)) by tracking the requirements imposed by those statutory provisions and the FCC's implementing regulations. *See AT&T Communications*, 229 F.3d at 465). A state commission's construction of such provisions is therefore tantamount to an interpretation of the 1996 Act and the FCC's regulations. Recognizing that such determinations involve matters of federal law

prevents state commissions from disturbing the balance of interests struck by Congress and promotes uniformity in the application of federal law. Indeed, the identical dispute over the requirements of federal law may arise either before or after an agreement is approved. In both circumstances, judicial review for consistency with federal law ensures that Congress's legislative choices will be respected.

B. Any Claim Based on a 1996 Act Interconnection Agreement Arises Under Federal Law

Even if § 252(a) did not grant Verizon an express statutory right to be held only to those obligations contained in its interconnection agreement, there is no question that Verizon's claims here depend on rights and obligations derived from the parties' interconnection agreement. In a regulatory scheme like the 1996 Act, where the governing document implements underlying federal statutory duties, the rights and duties imposed by those documents are questions of federal law. Two related lines of authority make that conclusion inescapable.

1. Disputes concerning 1996 Act interconnection agreements satisfy the "arising under" requirement of § 1331 because such documents are federal contracts that implement federal policy and embody federal standards. Unlike ordinary commercial contracts, which reflect voluntary undertakings by willing parties acting without legal compulsion, 1996 Act interconnection agreements are the product of federal legal coercion designed to implement federal obligations. Incumbent LECs such as Verizon are required by federal law to negotiate these agreements to discharge their obligations under the 1996 Act — specifically, "to fulfill the duties described in [§ 251(b) and (c)]." 47 U.S.C. § 251(c)(1). Federal law, moreover, requires incumbents to enter into good-faith negotiations at the behest of a requesting carrier even if they would

otherwise be unwilling to do so — indeed, even if state law would otherwise *prohibit* such inter-carrier negotiations and agreements. *See id.* § 261(c).

Further, federal law enumerates the specific duties that are subject to negotiation, establishes the minimum terms to which an incumbent must "agree" on request, and subjects the resulting agreements to governmental approval under specified federal standards, without which the agreement has no effect. *See id.* §§ 251(b)-(c), 252(e). Federal law further requires that these agreements be publicly filed, and it provides that the incumbent carrier must make the provisions of any approved interconnection agreement available to any other requesting carrier on the same terms and conditions. *See id.* § 252(h), (i). Finally, once such an agreement is approved, the incumbent has a federal-law duty to provide service "in accordance with the terms and conditions of the agreement." *Id.* § 251(c)(2)(D), (c)(3).

One cannot fairly describe such agreements as a genuine product of the parties' voluntary consent. On the contrary, they reflect the positive command of federal law. In closely analogous circumstances, this Court held that a dispute over the construction of a labor-management agreement entered into pursuant to § 204 of the Railway Labor Act raised a federal question for purposes of § 1331. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. at 695-96. The reasoning in that case compels the same conclusion here.

Under § 204, airlines and their employees were required to establish a board of adjustment to settle employee grievances. *Id.* at 686. A contract between an airline and a union established such a board, and the board ruled against the airline in a grievance proceeding. When the airline refused to comply, the union brought a federal action to enforce its award.

The court of appeals, affirming an order dismissing the case for lack of jurisdiction, held that the complaint "did not disclose 'affirmatively a federally-created cause of action' and that 'this suit is nothing more than a state-created action to construe a contract.'" *Id.* at 684.

This Court unanimously reversed. The Court noted that the duty to establish adjustment boards was imposed under § 204 and that "[t]he extent and nature of the legal consequences of this duty though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted." *Id.* at 690-91 (internal quotation marks omitted). For this reason, it was

> the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes. It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme.

Id. at 691. Accordingly, the Court concluded, "the § 204 contract . . . is a federal contract and is therefore governed and enforceable by federal law, in the federal courts." *Id.* at 692. Other decisions are to the same effect. *See, e.g., Norfolk & Western Ry. v. Nemitz,* 404 U.S. 37 (1971) (concluding that a dispute arising out of an agreement implementing obligations under the Interstate Commerce Act raised a federal question);

American Surety Co. v. Schultz, 237 U.S. 159 (1915) (holding that suit to enforce an appeal bond given to satisfy requirements of federal law raised a federal question).

This case is indistinguishable. Here, as in *Central Airlines*, it is federal law — specifically, §§ 251 and 252 — that determines whether the "contractual arrangements made by the parties are sufficient to discharge the mandate" of those sections; it is "federal law which would determine whether a [1996 Act interconnection agreement] is valid and enforceable according to its terms." *See* 47 U.S.C. § 252(e) (establishing federal standard for approval of interconnection agreements). Moreover, as with the § 204 contracts at issue in *Central Airlines*, 1996 Act interconnection agreements are Congress's chosen means for implementing the substantive duties contained in §§ 251 and 252: "[T]he federal statute is the source of the power and authority . . . . The enactment of the federal statute . . . is the governmental action . . . though it takes a private agreement to invoke the federal sanction." *Central Airlines*, 372 U.S. at 692 (ellipses and alteration in original; internal quotation marks omitted).[8] Finally,

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[8] Contrary to the Fourth Circuit's view (*see* Pet. App. 49a), this case is nothing like *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986). The plaintiffs in that case brought a state-law cause of action to vindicate rights established by state law; they claimed federal jurisdiction based only on the fact that the applicable standard of care under state law was based on a federal statute. It was conceded that Congress had "determin[ed] to preclude federal private remedies" for violation of the federal statute. *Id.* at 814. On the basis of that assumption, the Court held "simply . . . that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.* Here, by contrast, the rights to be protected are federal rights, arising from federal contracts, to be construed in accordance with federal law.

the allegation here is that the PSC has interpreted the interconnection agreement in a manner "contrary to the federal command" (*id.* at 691) and, as the FCC has made clear in its *ISP Remand Order*, "fatal to the goals of the Act" (*id.*).

The Fourth Circuit — while apparently acknowledging that "interconnection agreements are 'creations of federal law'" (Pet. App. 49a) — paradoxically concluded that the construction of the contract presented "a matter of State contract law" (*id.* at 27a) that did not raise a federal question. The court sought support for its view in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982). But, if anything, that case cuts in the opposite direction.

In *Jackson Transit*, this Court reaffirmed the principle that "suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes." *Id.* at 22. The decisive question, the Court reasoned, is whether Congress intended the contracts at issue to be "'creations of federal law'" and "the rights and duties contained in those contracts [to] be federal in nature." *Id.* at 23 (quoting *Central Airlines*, 372 U.S. at 692). The circumstances here amply satisfy that standard.

Although the Court in *Jackson Transit* observed that "the statute seems to make § 13(c) agreements and collective-bargaining contracts creatures of federal law" (*id.*), the specific case at issue involved a contract between a local government and its employees. The Court determined that "labor relations between local governments and their employees are the subject of a longstanding statutory exemption" and that § 13(c) "evince[d] no congressional intent to upset" that

exemption. *Id.* at 23, 24. Finding the statute inconclusive, the Court relied on explicit and "conclusive" legislative history to determine that Congress had "intended that labor relations between transit workers and local governments would be controlled by state law" to be "applied in state courts." *Id.* at 24, 29.

Contrary to the Fourth Circuit's view, however, that is not the case here. Nothing in the text or legislative history of the 1996 Act supports the court's inference that, insofar as § 252(e)(6) does not apply, Congress intended the relations between incumbent carriers and CLECs to be governed by state law or "for the right of review to be exercised in State courts." Pet. App. 49a. On the contrary, as this Court has said, "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T*, 525 U.S. at 378 n.6.

Under the 1996 Act, the relationship between incumbents and competitors is governed by interconnection agreements that are binding as a matter of federal law. Because those agreements are central to the realization of Congress's goals, the rights and duties arising out of such agreements are matters of federal law under this Court's precedents. Accordingly, where a plaintiff's claim for relief depends on the construction of such an interconnection agreement, the claim arises under federal law for purposes of § 1331.

2. A separate line of this Court's precedents — holding that the construction of a federal tariff raises issues of federal law — likewise supports § 1331 jurisdiction in this case. Interconnection agreements under the 1996 Act serve essentially the same function as, and evince the central attributes of, federal tariffs. The Act requires incumbent LECs to negotiate such agreements on request (47 U.S.C. §§ 251(c)(1), 252(a)(1)), to include in each such agreement "a detailed schedule of itemized

charges" (*id.* § 252(a)(1)), to file approved agreements with the state commission for public inspection (*id.* § 252(h)), to provide service according to their terms (*id.* § 251(c)(2)(D), (c)(3)), and to make the same provisions available to all other telecommunications carriers on the same terms and conditions (*id.* § 252(i)). Those provisions directly parallel the requirements that the Communications Act of 1934 imposes with respect to traditional common-carrier services. Thus, common carriers must "furnish . . . communication service upon reasonable request" (*id.* § 201(a)), must include in each tariff "schedules showing all charges" (*id.* § 203(a)), must file tariffs with the FCC for public inspection (*id.*), must provide service solely according to their terms (*id.* § 203(b)), and must provide service on the same terms to all comers (*id.* § 202(a)).

In sum, 1996 Act interconnection agreements function in all material respects as federal tariffs. This Court's jurisdictional decisions concerning federal tariffs therefore bear directly on the issue here. And those decisions hold consistently that a claim involving interpretation or enforcement of a federal tariff necessarily arises under federal law and presents questions reviewable in federal court.

In this Court's leading decision on the subject, *Louisville & N.R.R. v. Rice*, the plaintiff railroad sued to recover money "claimed to be due under tariffs approved and published as required by [the] Interstate Commerce Act." 247 U.S. at 201. The district court dismissed the action for lack of jurisdiction, and this Court reversed. Noting that "[t]he Interstate Commerce Act requires carrier to collect and consignee to pay all lawful charges duly prescribed by the tariff," the Court concluded that "[t]heir duty and obligation grow out of and depend upon that act." *Id.* at 202. "The railroad company set up a claim based upon provisions of a tariff duly filed, published and approved

as required by Interstate Commerce Act; result of the action necessarily depended upon construction and effect of that act." *Id.* at 203. *See also Great Northern Ry. v. Merchants' Elevator Co.*, 259 U.S. 285, 290 (1922) ("Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law.").

More recently, a unanimous Court reaffirmed that holding in *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.* As in *Rice*, the plaintiff common carrier sued to collect charges said to be owed under "tariffs on file with the [Interstate Commerce] Commission." 460 U.S. at 533. The district court dismissed the claim; the Ninth Circuit affirmed, characterizing the suit as a "simple contract-collection action." *Id.* (internal quotation marks omitted). This Court summarily reversed. Relying on *Rice*, the Court held that, in any case involving a claim under a federal tariff, "'the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation.'" *Id.* at 535 (quoting *Rice*, 247 U.S. at 203). "A carrier's claim is, of necessity, predicated on the tariff" and therefore implicates the federal statute. *Id.*[9] This rule has been widely applied by the federal courts of appeals

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[9] Both *Rice* and *Thurston Motor Lines* involved the scope of federal jurisdiction under 28 U.S.C. § 1337. With the removal of the amount-in-controversy requirement in 28 U.S.C. § 1331, any claim "arising under any Act of Congress regulating commerce" (28 U.S.C. § 1337(a)) necessarily also "aris[es] under the . . . laws . . . of the United States" (*id.* § 1331). *See, e.g., ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998) ("[A]ny action that could be brought in federal court under § 1337 could also be brought under § 1331."); *Winstead v. J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991) (Posner, J.); 13B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3574, at 236 & n.5 (2d ed. 1984).

to federal tariffs filed with the FCC pursuant to § 203 of the Communications Act.[10]

The same considerations that established federal jurisdiction in *Rice* and *Thurston Motor Lines* support federal jurisdiction here. An incumbent carrier's "duties and obligations" under a 1996 Act interconnection agreement, like its duties under a federal tariff, arise from federal law, and that is true even if, as here, the particular terms at issue were the result of "voluntary" negotiation rather than arbitration. As we have shown, such negotiations necessarily occur in the context of a statutory and regulatory regime that specifies the minimum terms to which state commissions will hold an incumbent carrier in the absence of a negotiated agreement. As the Fourth Circuit itself explained in a prior 1996 Act case, "many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act." *AT&T Communications*, 229 F.3d at 465.

Moreover, tariffs that are the product of negotiations are not for that reason immune from treatment as tariffs. For example, in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), natural gas producers negotiated a price schedule with purchasers; the contract was filed with the Federal Power Commission, which authorized the sale. *Id.* at 573-74. The Court held that

[10] *See, e.g., Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d 479, 482, 488 (2d Cir. 1998); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-89 (7th Cir.) (Posner, J.), *cert denied*, 524 U.S. 952 (1998); *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1093-96 (3d Cir. 1995), *cert. denied*, 519 U.S. 815 (1996); *Western Union Int'l, Inc. v. Data Dev., Inc.*, 41 F.3d 1494, 1496 (11th Cir. 1995); *MCI Telecomms. Corp. v. Graham*, 7 F.3d 477, 479-80 (6th Cir. 1993); *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387-88 (8th Cir. 1992). *See also AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (noting that Communications Act's provisions "are modeled after similar provisions of the Interstate Commerce Act . . . and share its goal of preventing unreasonable and discriminatory charges").

the filed rate doctrine applied fully to those rates. *Id.* at 577-79. *See also* 47 C.F.R. § 61.55 (governing "contract-based tariffs"); *Fax Telecommunicaciones*, 138 F.3d at 482, 488; *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990) ("rates arrived at through negotiations between a carrier and an individual customer and then made generally available to other similarly situated customers" are lawful tariffs if "filed with the FCC"); *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1316-19 (D.C. Cir. 1984).

It follows that 1996 Act interconnection agreements, like federal tariffs, are governed by federal law. A claim challenging a state agency's interpretation of such an agreement therefore arises under federal law and is subject to the § 1331 jurisdiction of the federal courts.

II. NO OTHER PROVISION OF LAW DEPRIVES FEDERAL COURTS OF JURISDICTION OVER CLAIMS LIKE VERIZON'S

Because Verizon's claims arise under federal law, the requirement for district court jurisdiction under 28 U.S.C. § 1331 is satisfied. The sole remaining question, therefore, is whether any other provision of law withdraws that federal jurisdiction.

The Fourth Circuit invoked two possible statutory limitations. First, the court held that § 252(e)(6) does not apply to state commission decisions interpreting or enforcing interconnection agreements. It then inferred that, because "Congress created a limited federal right of review of State commission determinations as defined in 47 U.S.C. § 252(e)(6)," it must have "intended for the right of review to be exercised in State courts" whenever § 252(e)(6) does not apply. Pet. App. 49a. Second, the Fourth Circuit believed that, "in the absence of specific federal authorization," it would "violate basic tenets of federalism" to permit a federal

court to "review a State quasi-judicial body." *Id.* at 50a.[11]

For the reasons set forth below, neither of these sources of law bars a district court's exercise of subject matter jurisdiction in this case.

A. Section 252(e)(6) Does Not Withdraw Subject Matter Jurisdiction from the Federal Courts

Verizon has consistently maintained that § 252(e)(6) provides an explicit cause of action for parties aggrieved by any determination of a state commission concerning the scope of a carrier's duties under the 1996 Act, including determinations that involve the interpretation and enforcement of interconnection agreements. But on the assumption, for purposes of this case, that § 252(e)(6) does not reach such determinations, the proper conclusion is that judicial review is

[11] Because defendants in the district court included state officers, this case also presents the question whether "the relief sought against the officer is not, in substance, sought against the sovereign." *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952). This Court, however, limited its grant in this case to Question 2 presented by each petition for a writ of certiorari, thereby omitting the question "[w]hether the *Ex parte Young* doctrine permits an action against the members of a state public utility commission in their official capacity to enjoin ongoing violations of federal law in their performance of federal regulatory functions." No. 00-1531 Pet. i. Verizon therefore will not discuss the *Ex parte Young* issue in this brief. Instead, Verizon (along with two others) has filed a brief as *amici curiae* in No. 00-878, where it will explain that the relief sought here — an injunction against enforcement of an unlawful adjudicatory order — falls squarely within the rule of *Ex parte Young*. Even if the Court were to hold (in No. 00-878) that *Ex parte Young* does not permit an action against the state commissioners, the Court would still have to vacate the Fourth Circuit's judgment and remand for consideration of the question whether Verizon's suit could proceed against the private party defendants. The Fourth Circuit itself suggested that an action for review of the PSC's ruling might proceed without the presence of the PSC or its commissioners. *See* Pet. App. 15a. This "uncertainty surrounding the indispensable-party issue" (*id.*) would have to be resolved before Verizon's case could be dismissed.

nonetheless appropriate under the district court's general federal-question jurisdiction.

The "strong presumption" is that, when Congress delegates power to an executive agency, "Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670. As the Court has explained, "[w]hen . . . definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Stark v. Wickard*, 321 U.S. at 309 (footnote omitted). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs.*, 387 U.S. at 141.

There is no such evidence here. Contrary to the Fourth Circuit's understanding, "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Id.* (internal quotation marks omitted).

In *Bowen*, for example, respondents had filed an action challenging the validity of a Medicare regulation on statutory and constitutional grounds. The government argued that Congress had "forbidden judicial review of all questions affecting the amount of benefits." 476 U.S. at 669. But, the Court held, the fact that Congress had "carefully detail[ed] the forum and limits of review" concerning determinations of the *amount* of benefits simply "does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations*

themselves." *Id.* at 675. Accordingly, all eight participating Justices agreed that the "presumption" that Congress "expects the courts to grant relief when an executive agency violates [its statutory commands]" controlled the case. *Id.* at 681.

Stark v. Wickard likewise supports jurisdiction here. The statute at issue included several specific judicial review provisions, none of which applied to the petitioners' challenge. 321 U.S. at 307-08. Far from reading these judicial review provisions as exclusive, the Court interpreted them as evidencing the "recognition by Congress of the applicability of judicial review in this field," a reading that militated *against* an interpretation of the statute that would "bar[] from the courts an otherwise justiciable issue." *Id.* at 309.

In the Fourth Circuit's view, the absence of a specific provision in the 1996 Act authorizing federal court review for state commission determinations (other than an initial approval or rejection) indicated that Congress intended state court review under state statute to be a party's sole remedy when such a determination violates federal law. *See* Pet. App. 35a. But there is nothing in the statutory language to support such an inference. On the contrary, the 1996 Act's sole mention of state courts is in a provision specifically *withdrawing* the authority of state courts to hear cases that arise out of state commission determinations under the 1996 Act. *See* 47 U.S.C. § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."). Even assuming for purposes of this case that § 252(e)(4) and (e)(6) do not reach the determination at issue here, the fact that Congress specifically designated federal courts as the *exclusive* forum for review in certain situations cannot support an inference that Congress intended to withdraw federal jurisdiction in other situations.

That conclusion is reinforced because Congress has demonstrated in other contexts that, when it wants to withdraw federal jurisdiction and designate state courts as the exclusive forum for reviewing administrative determinations under a federal statute, it plainly knows how to do so. For example, the Public Utility Regulatory Policies Act of 1978 contains a provision specifically limiting federal court jurisdiction except in designated circumstances. *See* 16 U.S.C. § 2633(a) ("[n]otwithstanding any other provision of law, no court of the United States shall have jurisdiction over any action arising under any provision of subchapter I or II of this chapter or of this subchapter" with specific exceptions). Likewise, the Trade Act of 1974 provides that "[a] determination by a cooperating State agency with respect to entitlement to program benefits . . . is subject to review in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent." 19 U.S.C. § 2311(d); *see International Union, United Automobile Workers v. Brock*, 477 U.S. 274, 293 (1986) (White, J., dissenting) ("Congress thus expressed the intent that . . . the agency and state courts shall have exclusive jurisdiction").

The absence of a comparable provision in this statute is significant for two reasons. First, that Congress has included such provisions in other statutes reveals its understanding that, in the absence of limiting language, federal court jurisdiction extends to any determination that a state agency makes in its administration of a federal statute; otherwise, such provisions would be surplusage. Second, the fact that Congress chose *not* to include such a provision here indicates that Congress intended federal courts to exercise their subject matter jurisdiction in this area to the fullest extent.

Moreover, even if a state has an applicable procedure for judicial review, that says nothing about whether the presence of state jurisdiction should be read to foreclose review in federal court. The Court made this point in *Smyth v. Ames*, 169 U.S. 466 (1898), in which a railroad had brought an action to enjoin the state board of transportation (among others) from enforcing a railroad rate that was said to be unconstitutional. *See id.* at 469-70. The defendants argued that federal jurisdiction was not available because the plaintiffs had an adequate remedy under state law. *See id.* at 478. The Court rejected the argument: "One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action." *Id.* When a plaintiff seeks review of state agency action on the ground that it violates federal law, "if it prefers to entrust the final decision to the Courts of the United States rather than to those of the State [it] has a right to do so." *Railroad & Warehouse Comm'n v. Duluth Street Ry.*, 273 U.S. 625, 628 (1927); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 293 (1997) (O'Connor, J., concurring in part and concurring in the judgment) (noting that the doctrine of *Ex parte Young* has been applied to authorize federal jurisdiction "[e]ven if there is a prompt and effective remedy in a state forum") (alteration in original; internal quotation marks omitted).

Indeed, in the circumstances presented here, even if Verizon has pursued a *cause of action* under state law, the district court had subject matter *jurisdiction*, because Verizon's "complaint established that its right to relief . . . requires resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983). As

noted above, there can be no question that the underlying claims of right in Verizon's suit are federal — including the significance of § 252(a)(1) and the duties imposed under the parties' 1996 Act interconnection agreement.[12] Accordingly, Verizon's claims "'arise under' the laws of the United States" and "unquestionably" present a federal question under § 1331; the suit may therefore be brought in federal court. *City of Chicago*, 522 U.S. at 164.

B. The *Rooker-Feldman* Doctrine Does Not Bar Federal Judicial Review of State Administrative Action

Contrary to the Fourth Circuit's view, the *Rooker-Feldman* doctrine does not apply to this case. The court of appeals acknowledged that "strict application of the doctrine requires a final judgment from State courts," but it nonetheless believed that "the federal intrusion into State affairs is not any less when the judgment issues from a State quasi-judicial body." Pet. App. 50a. As this Court made clear in *City of Chicago*, however, it is entirely appropriate — indeed, commonplace — for federal courts to review state administrative action in the first instance, even if a state procedure for review is available.

City of Chicago involved an adjudication by Chicago's Historical and Architectural Landmarks Commission that two of respondent's buildings qualified for landmark status under the applicable ordinance. 522 U.S. at 159-60. Respondents filed an action for judicial review under the state administrative review law, alleging that the statute — both on its face and as applied — was unconstitutional and that the proceedings

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[12] In addition, because the parties' obligations precisely track obligations imposed under § 251(b)(5), Verizon's cause of action necessarily requires the resolution of the obligations imposed under that federal provision.

also had violated the constitution. *Id.* at 160. The complaint also sought relief on purely state-law grounds. *Id.* Petitioners removed the action on the basis of federal-question jurisdiction, and the district court denied a motion to remand. *Id.* at 161. The Seventh Circuit reversed, holding that a federal court lacked jurisdiction to engage in deferential review of state agency action. *Id.* at 162 (noting that the Seventh Circuit had determined that "a proceeding to review state administrative action under a deferential standard is not a 'civil action'").

This Court reversed. First, the Court held that, even though respondent had invoked a state cause of action, its claims arose under federal law because "a 'right or immunity created by the Constitution or laws of the United States [was] an element, and an essential one, of the plaintiff's cause of action.'" *Id.* at 164 (quoting *Gully*, 299 U.S. at 112). Second, the Court held that the district court had supplemental jurisdiction over any claims that arose under state law (*id.* at 165-66) — for example, the state-law claim that the Chicago Landmarks Commission had misapplied its ordinances.

The Court rejected the argument that the federal court was deprived of jurisdiction because an action for on-the-record review was not a "civil action[]" within the "original jurisdiction" of the district court for purposes of the removal statute: it held that, even if its "state claims" were not civil actions, its federal claims were. Just as important for present purposes, the Court made clear that an action to secure "judicial review of state administrative decisions" is "generally encompasse[d]" within federal subject matter jurisdiction under § 1331. *Id.* at 169. As the Court noted, "district courts routinely conduct deferential review pursuant to their original jurisdiction over federal questions, including on-the-record review of federal administrative action." *Id.* at 171. *See also Shields*,

305 U.S. at 184 ("respondent was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the [Interstate Commerce] Commission's determination").

City of Chicago makes clear that *Rooker-Feldman* is inapplicable to the circumstances presented here. That doctrine applies to situations where a state *court* renders a final judgment; in such circumstances, Congress intends that the sole avenue into federal court should be a petition for certiorari invoking the explicit authority of the Supreme Court to review the judgments of "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). But § 1257 makes no mention of administrative agencies, and *City of Chicago* itself involved administrative determinations made pursuant to established standards; both the determinations and the standards were said to violate the federal constitution. Whether or not administrative action involves an adjudicative function, and whether or not such action is subject to review in state court, a federal forum is available for claims that such administrative action has violated federal law.

The conclusion that the exercise of federal jurisdiction is appropriate is even clearer in this case than it was in *City of Chicago* for two reasons. First, the agency action here was undertaken in the exercise of authority granted under *federal* law. Contrary to the Fourth Circuit's understanding, nothing in Maryland law authorizes the PSC to hear a complaint against Verizon alleging a violation of *federal* law. On the contrary, the provision of Maryland law on which the Fourth Circuit relied makes clear that a person may file a complaint only to "allege a violation *of this article*" — *i.e.*, the state statute, not the 1996 Act. Md. Code Ann., Pub. Util. Cos. § 3-102(a)(2) (1998) (emphasis added). Nothing in the complaint underlying this case alleged that Verizon had violated any

provision of the Maryland Public Utility Companies law; instead, the allegation was that Verizon had violated the 1996 Act and the parties' 1996 Act interconnection agreement.

Accordingly, it was only to the extent that federal law authorized the administrative complaints at issue here that preliminary resort to the PSC was appropriate. As every other federal court to consider the question has agreed, a state commission's authority to consider such complaints derives from its authority under § 252 to arbitrate and approve interconnection agreements. *See Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("we can reach no conclusion but to agree with the FCC's determination that the state commissions' power to enforce interconnection agreements springs from § 252"); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000) ("[a] state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements"), *cert. denied*, 121 S. Ct. 896 (2001); *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000) ("[T]he Act's grant to the state commissions of plenary authority to approve or disapprove . . . interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.").

The conclusion that the delegation of federal authority to state commissions includes the power to interpret and enforce interconnection agreements reflects the settled principle that the agency entrusted with making the policy judgments inherent in overseeing the approval of a federal tariff is likewise the exclusive original tribunal for claims that require construction of disputed terms. *United States v. Western Pac. R.R.*,

352 U.S. 59, 65-66 (1956); *Great Northern*, 259 U.S. at 291. In this case, the issue presented — the meaning of the interconnection agreement provision requiring reciprocal compensation "as . . . required by the Act" and limiting such compensation to "local traffic" as specifically defined in keeping with FCC regulations — involved the type of issue that must be resolved in the first instance by the agency with "the law-making power over certain aspects of commercial relations." *Western Pac.*, 352 U.S. at 65 (internal quotation marks omitted). The courts have therefore correctly concluded that the type of determination at issue here is one made under the authority delegated by federal law. Accordingly, the PSC was acting as a *federal* agency, not merely as a state agency, because it was exercising a power delegated by Congress, not the state. The rule of *Califano v. Sanders*, 430 U.S. 99 (1977), that "federal district courts may engage in on-the-record, substantial evidence review of federal agency actions under § 1331" (*City of Chicago*, 522 U.S. at 183 (Ginsburg, J., dissenting)) fully applies here.

Second, unlike *City of Chicago*, where the plaintiff had raised both federal and state-law challenges to state administrative action taken under state law, this case raises *no* issue of state law. The administrative scheme at issue here is exclusively federal, and the obligations imposed by the interconnection agreements at issue are likewise exclusively federal. *See supra* at 20-29. Accordingly, the only legal issues presented are matters of federal law. Forcing Verizon to litigate these issues in state court — whether or not the state court properly has jurisdiction — "would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts." *England v. Louisiana State Board of Med. Examiners*, 375 U.S. 411, 415 (1964).

For the same reason, the principles underlying abstention doctrine could not support a federal court's refusal to exercise jurisdiction in this case. Because the issues here are ones purely of federal law, this case "does *not* demand significant familiarity with, and will not disrupt state resolution of, distinctively local regulatory facts or policies." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 364 (1989). In such circumstances, the district court must exercise the federal jurisdiction conferred by Congress.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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